

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT LEMON,

Defendant-Appellant.

UNPUBLISHED

May 22, 2003

No. 232854

Oakland Circuit Court

LC No. 00-170513-FH

Before: Murray, P.J., and Neff and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d, and furnishing alcohol to a minor, MCL 436.1701(1). He was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 3 to 22-1/2 years for the CSC conviction and ninety-one days for furnishing alcohol to a minor. After defendant filed an appeal as of right, this Court granted his motion for remand to the trial court to hold an evidentiary hearing to reconsider the issue of ineffective assistance of trial counsel. On remand, the trial court conducted the evidentiary hearing as directed and granted defendant a new trial on the basis that he was denied the effective assistance of counsel. We now vacate the order granting defendant a new trial and affirm defendant's convictions and sentences.

I

Defendant was convicted of furnishing alcohol to a sixteen-year-old minor and then sexually assaulting her by digitally penetrating her vagina. The offenses allegedly occurred in November 1998, inside a trailer owned by George Kitchen, when defendant was twenty-three years old. The complainant's twin sister and Kitchen, with whom defendant shared the trailer, allegedly witnessed the sexual assault and corroborated the complainant's version of events. Defendant denied sexually assaulting the complainant and maintained that Kitchen and the twin sisters fabricated the entire incident.

Defendant raises three issues on appeal, none of which establishes error requiring reversal.

II

Defendant first argues that trial counsel was ineffective. We disagree.

As noted, this case was remanded to the trial court for an evidentiary hearing on the issue of ineffective assistance of counsel. Defendant claimed that counsel was ineffective for failing to present evidence that defendant's girlfriend had filed a police report and obtained a personal protection order (PPO) against Kitchen, and that the complainant and her twin sister had joined with Kitchen in filing a petition for a PPO against the parents of defendant's girlfriend. Defendant maintains that this evidence would have explained why Kitchen and the twin sisters both were biased against him and motivated to fabricate the charges of which he was convicted. Following a *Ginther*¹ hearing, the trial court agreed that the evidence was relevant to the issue of Kitchen's bias and concluded that counsel's failure to present this evidence denied defendant the effective assistance of counsel.

A

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Factual findings made by the trial court concerning the issue are reviewed for clear error. *Id.* To establish ineffective assistance of counsel, a defendant must show "that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Id.* at 578, quoting *People v Mitchell*, 454 Mich 145, 155-156; 560 NW2d 600 (1997) (citations and internal quotation marks omitted). The defendant must show that his counsel's representation "fell below an objective standard of reasonableness" and "must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The defendant must also demonstrate that counsel's deficient performance "was so prejudicial to him that he was denied a fair trial." *Id.* To establish prejudice, the defendant must demonstrate "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'" *Id.* at 302-303, quoting *Mitchell, supra* at 167. There is a strong presumption that counsel's actions constituted sound trial strategy. *Mitchell, supra* at 156.

B

Initially, we note that the trial court exceeded the scope of this Court's remand order when it granted defendant a new trial on the basis of ineffective assistance of counsel. Although the trial court was directed to make findings of fact and a determination on the record, this Court retained jurisdiction to decide the issue whether defendant was denied the effective assistance of counsel. *People v Hondra Smith*, 464 Mich 876; 630 NW2d 625 (2001). The purpose of the remand was to require the trial court to create an adequate record on which this Court could review the issue on appeal. Accordingly, the order granting defendant a new trial is vacated.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

C

Trial defense counsel testified at the remand hearing that he had been an attorney for almost twenty years, that approximately fifty percent of his practice was criminal defense, and that half of his criminal practice was appellate. He testified that he had tried more than one hundred criminal cases, many of which involved capital offenses, and that in the Oakland County criminal appointment system he is rated at level one, which qualifies him to represent criminal defendants in capital cases. He was retained, not appointed, to represent defendant in this case. He had a definite trial strategy and discussed it with defendant; defendant and his parents were in agreement with counsel's strategy. No expert witness testified that counsel's representation of defendant was deficient.

Unlike the trial court, we conclude that defense counsel's decision not to further investigate and present evidence concerning the matters in question did not amount to ineffective assistance of counsel. In order to present the evidence suggesting that Kitchen had a possible motive to falsely accuse defendant, evidence of defendant's relationship with his girlfriend, including her age, would inevitably have come out. Significantly, the evidence indicated that, while defendant was twenty-three years old at the time of the charged sexual assault, his girlfriend was fifteen. At the *Ginther* hearing, counsel explained that he intentionally avoided presenting any evidence that would have injected defendant's girlfriend into the case because he believed it "would have destroyed everything that I was working on for the reason that [defendant] besides being charged with criminal sexual conduct, was also charged with contributing to the delinquency of a minor."

In determining that defense counsel was ineffective, the trial court appears to have erroneously concluded that counsel viewed the age disparity as a concern only as it related to the misdemeanor charge of furnishing alcohol to a minor. It is apparent, however, that counsel also believed that evidence that defendant had a fifteen-year-old girlfriend would reflect unfavorably on defendant as to the charge of sexually assaulting a sixteen-year-old minor. Counsel explained that, if defendant's girlfriend was involved in the trial, he felt the jury would have concluded that defendant, despite his age of twenty-three, "was of such a mind that he did things with 16 and 17 year old girls." It was counsel's belief that defendant's girlfriend's age and the "possible connection" would have destroyed defendant's case. Therefore, as a matter of carefully planned trial strategy, counsel deliberately avoided presenting evidence that would have injected defendant's girlfriend into the case.

This Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *People v Kevorkian*, 248 Mich App 373, 414; 639 NW2d 291 (2001). Here, counsel made a strategic decision not to present the disputed evidence and, under the circumstances, we cannot say that the strategy was unreasonable. The fact that the strategy did not result in the outcome desired by defendant does not demonstrate that counsel was ineffective. *Id.* at 414-415.

D

Defendant also claims that counsel should have investigated and presented evidence concerning the December 29, 1999, arrest of Kitchen, the complainant and her twin sister at a concert. Defendant has not demonstrated that counsel's failure to pursue this matter resulted in "counsel's ignorance of valuable evidence which would have substantially benefited the

accused.” See *People v Caballero*, 184 Mich App 636, 640, 641-642; 459 NW2d 80 (1990) (alleged failure to adequately interview witnesses.) Indeed, it is apparent that most of the evidence concerning the December 29, 1999, matter would not have been admissible.

First, the incident did not involve defendant and was not directly relevant to a determination of his guilt or innocence of the charged offenses. Second, evidence that Kitchen and the twin sisters had been arrested was not admissible to impeach their credibility, MRE 609. Defendant has not shown how such evidence would have been relevant to show bias and we cannot imagine how the evidence would have been relevant for such purpose. *People v Layher*, 464 Mich 756, 766-769; 631 NW2d 281 (2001). Third, defendant could not have introduced extrinsic evidence (e.g., a report concerning the incident) to show that the girls lied about their address on that occasion, because the incident involved a collateral matter, unrelated to defendant’s guilt or innocence. *LeBlanc, supra* at 590; MRE 608(b). Finally, defendant has not demonstrated an alternative, “noncharacter theory” for admitting the evidence under MRE 404(b) and we can discern none. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). Accordingly, defendant has failed to show that counsel’s ignorance of the incident denied him the effective assistance of counsel.

E

Defendant further argues that counsel was ineffective because, after Kitchen conveyed damaging information during a rambling response to a question, counsel failed to either ask that the nonresponsive answer be stricken or request a mistrial. At the *Ginther* hearing, counsel explained that he did not react to the rambling statement because he thought it made Kitchen appear less credible. Indeed, in his closing argument, counsel referred to the statement as reflecting unfavorably on Kitchen’s credibility. Counsel’s handling of this situation was clearly a matter of trial strategy. Counsel had to decide whether to downplay the information mentioned by Kitchen, possibly highlight its significance and potentially prejudicial effect by requesting that it be stricken and that a curative instruction be given, or attempt to use it to defendant’s advantage. See *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). He chose the latter. We will not second-guess counsel’s decision. *Id.* at 445.

F

Defendant has failed to demonstrate that trial counsel’s performance fell below an objective standard of reasonableness, that counsel’s representation deprived him of a fair trial, and that, but for the alleged unprofessional errors of counsel, the results of the trial would have been different. The trial court clearly erred in concluding otherwise.

III

Defendant also argues that a new trial is required because of the prosecutor’s misconduct. Because defendant did not object to the challenged conduct below, we review this issue for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

The prosecutor did not improperly vouch for the credibility of the complainant when he remarked in opening statement that the complainant told the detective “exactly pretty much what

I've told you and she's going to tell you in a few moments exactly what happened in her own words." The prosecutor was referring to the facts he intended to present. The prosecutor did not suggest that he had some "special knowledge or facts indicating the witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276-277; 531 NW2d 659 (1995).

Defendant also challenges an exchange between the prosecutor and the complainant concerning the complainant's report of a phone call from defendant. Even if the question suggested that the prosecutor had personal knowledge about a conversation he had with the complainant, and thereby implied that he had "special knowledge or facts indicating the witness' truthfulness", defendant's substantial rights were not affected. The fact that more than a year after the incident the complainant reported that defendant had apologized months after the incident did not make her testimony more credible. Also, the phone call was not material to defendant's guilt or innocence of the charges. See *People v Rodriguez*, 251 Mich App 10, 35; 650 NW2d 96 (2002). As for defendant's contention that the complainant's trial testimony about her preliminary examination testimony and what she told the detective was inadmissible hearsay, defendant has not identified an out-of court statement that was offered to prove the truth of the matter asserted. MRE 801(c). Thus, we find no support for defendant's argument that the prosecutor committed misconduct by asking questions on this subject.

We also reject defendant's arguments concerning the prosecutor's remark during opening statement that "defendant should get an A plus for victim selection because the person he chose was afraid to go to the police." The statement did not suggest that there was evidence known to the prosecutor that defendant had considered other victims. Nor was the statement an improper civic duty argument suggesting that defendant was a danger to society. See *Bahoda*, *supra* at 282-285.

The prosecutor's use of an analogy in his closing argument was not improper. Contrary to what defendant argues, the analogy did not create an impression that defendant had confessed in this case.

Additionally, the prosecutor did not vouch for his witnesses by noting that he would be concerned if witnesses in a case sounded, "as though it's a tape recording, each witness testifying exactly the same. It's going to scare me because I'm going to wonder if they got together and made up this story because it's so good and it fits together so well." The argument was directed at the jurors' common sense and did not imply that the prosecutor had "special knowledge or facts indicating the witness' truthfulness." *Bahoda*, *supra* at 276-277.

Also, the prosecutor did not improperly ask the jurors to place themselves in the position of the victim by asking them to recall when they were sixteen years old. This remark is analogous to those in *People v Cooper*, 236 Mich App 643, 652-654; 601 NW2d 409 (1999), where the prosecutor asked the jury to understand that the victim's display of anger during his testimony did not make him incredible, but rather was consistent with his account. In this case, the crux of the prosecutor's argument was to explain that the complainant's delay in reporting the charged incident and her conduct in admittedly lying to the police about her address was understandable in light of her youth. Because the crux of the prosecutor's argument was not improper, and any perceived prejudice could have been cured by a cautionary instruction, defendant is not entitled to reversal on this basis. *Id.* at 653-654.

The prosecutor did not shift the burden of proof by arguing that there was “no evidence” to support defendant’s theory that the prosecution witnesses’ account was a fabrication. The argument was a comment on the weakness of the defense theory and is akin to arguing that evidence is undisputed or uncontradicted, which is not improper. *People v Fields*, 450 Mich 94, 104-116; 538 NW2d 356 (1995).

We likewise reject defendant’s claim that defense counsel was ineffective for failing to object to these alleged instances of misconduct. As discussed above, most of the challenged conduct was not improper and, therefore, counsel was not ineffective for failing to object. As for those instances in which the propriety of the prosecutor’s conduct is less clear, defendant has not shown a reasonable probability that, but for counsel’s failure to object, the outcome of the trial would have been different. *Toma, supra* at 302-303.

IV

Defendant also argues that he was deprived of a fair trial because of instructional error, and that counsel was ineffective in his handling of the instructions.

First, defendant argues that, because Kitchen admitted having a prior conviction for stealing, counsel should have requested that the court instruct the jury pursuant to CJI2d 5.1 (impeachment by prior conviction), rather than requesting an instruction that counsel had drafted himself. Further, defendant argues that the trial court had a responsibility to give CJI2d 5.1, even in the absence of a request from counsel.

Although CJI2d 5.1 was applicable to this case, defendant was not prejudiced by its omission in light of the court’s general instruction concerning the assessment of the witnesses’ credibility and counsel’s argument relating Kitchen’s conviction as affecting his credibility. See *Johnson v Corbet*, 423 Mich 304, 327-332; 377 NW2d 713 (1985). Also, counsel’s failure to request the standard instruction did not deprive defendant of the effective assistance of counsel because defendant has not shown a reasonable probability that the outcome would have been different had the instruction been given. *Toma, supra* at 302-303.

Next, defendant argues that the trial court erred by failing to instruct on impeachment by a prior inconsistent statement, CJI2d 4.5, and by giving an instruction concerning a statement made by defendant when there was no evidence to support it. Defendant further argues that counsel was ineffective for failing to request the former instruction and failing to object to the latter.

Appellate review of these instructional issues has been waived, given defense counsel’s statement at the conclusion of the jury charge that he had no objection to the instructions as given. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002). Thus, with respect to these instructions, there are no errors to review. *Id.*

Further, we are not persuaded that defendant was denied the effective assistance of counsel. Even if counsel’s performance in this regard was deficient, defendant has not shown a reasonable probability that, but for counsel’s alleged errors, the result of the proceeding would have been different. *Toma, supra* at 302-303. The instructions did not pertain to basic and controlling issues in the case. *Ortiz, supra* at 311-312. Additionally, we find no merit to

defendant's claim that the inclusion of CJI2d 4.1 may have misled the jury into believing that defendant had confessed to the crimes charged.

The order granting defendant a new trial is vacated and defendant's convictions and sentences are affirmed.

/s/ Christopher M. Murray

/s/ Janet T. Neff

/s/ Michael J. Talbot